The Central Law Journal.

SAINT LOUIS, OCTOBER 25, 1878.

CURRENT TOPICS.

In *Hallock v. Dominey*, recently decided by the New York Court of Appeals, the protection given to acts done under process of court was considered under the following circumstances: The supervisors of Suffolk, acting under a statute which conferred certain powers of legislation upon supervisors, passed a penal ordinance against taking fish in the waters of East Hampton. Plaintiff was sued by the defendant before a justice of the peace of that town for a penalty under the ordinance, and he not appearing, judgment went by default, and the defendants caused his arrest on final process, to be released from which he paid the judgment; and thereupon he sued for false imprisonment. The supreme court (7 Hun, 52) held that although the defendants acted in good faith, and in the belief that they were justified, yet the statute itself being unconstitutional, the acts of the board of supervisors conferred no jurisdiction on the justice of the peace to entertain the action or issue the execution. The court of appeals, reversing this judgment, hold that as the penalty was less than $200, and personal service had been made, the justice had jurisdiction. The jurisdiction of the magistrate is not derived from the act under which a penalty is imposed, but from the general statutes of the state; and he had jurisdiction to pass upon every question involved in the action, including the validity of the law imposing the penalty; and on this question the judgment, so long as unreversed, was conclusive between the parties. The process, therefore, was a protection to the officer and to those at whose instance it was issued. See Erskine v. Hohnback, 14 Wall. 613; Meeker v. Van Ranssalear, 15 Wend. 397; Leachman v. Dougherty, 81 Ill. 324; Walker v. Mosely, 5 Denio, 102; 14 N. Y. Daily Reg. 752.

Among the oral and unreported rulings made in the United States circuit court, sitting at St. Louis, during the present term, are the following: In *Platt v. Mutual Life Insurance Co.*, DILLON, J., held that where witnesses reside more than one hundred miles from the place of trial, whose testimony is material and good, and sufficient cause is shown, a continuance will be granted, and amended rule 44, requiring cases removed from state courts to be tried at the first ensuing term, will not apply arbitrarily.——In *Rogers v. Mayfield* the defendant executed in the State of Illinois his promissory note, payable in Missouri, for the sum of $1,000, and "twenty four per cent. interest per annum after maturity as compensation and damages for non-payment thereof at maturity." Plaintiff, a citizen of Missouri, became the holder of the note for value, and brought suit to recover principal and interest at the rate of twenty-four per cent. per annum as damages. Upon default and inquiry, DILLON, J., held that the note being payable in this state is to be governed by its laws, and ordered judgment for principal and interest at the rate of six per cent. per annum.——In *Foote v. Marion County* the plaintiff obtained judgment at the last term on coupons attached to township railroad aid bonds issued by the defendant county, and prior to the present term served notice on the justices of the county court and county treasurer that he would apply for a peremptory writ of *mandamus* at the opening of the present term. Upon presentation of application, it appearing that the county treasurer had on deposit a sum applicable to the payment of this judgment, DILLON, J., held that although inclined to the opinion that under the township aid act, the treasurer can pay coupons and matured bonds when presented to him without first having a warrant from the county court, yet as the coupons in this case were merged in a judgment, and consequently could not be presented strictly under said act, it was proper to issue a *mandamus* on the county court to draw a warrant on the treasurer, and also on the treasurer to pay said warrant when presented.

In the case of *Fourth National Bank v. Franklin County*, which came before the United States Circuit Court, sitting in this city, during its present term, a new question of interest to those engaged in bond litigation, was discussed at the bar and passed upon by

the Circuit Judge. The question arose on an application for a peremptory writ of *mandamus* to levy a tax to pay a judgment of $150,000, obtained against the county. Counsel submitted two forms of an order for a peremptory writ. One of these forms distributed the levy to be made over three years. The other wanted a peremptory writ, commanding the county to levy—when it levies its general tax—the sum of $150,000 to be collected in one year. When the matter was upon the return to the alterative writ, the attorney for plaintiff stated that he was willing, whatever might be his legal rights in the matter, to give the county the benefit of this distribution, if it could be done. DILLON, J., in deciding the motion for the peremptory writ, delivered an oral opinion, as follows: "There are two views in this matter: One is, that this *mandamus*, proceeding as a sequel to the judgment in this court, is in the nature of a writ of execution; and that the creditor has a right to have the writ go for the full sum, against this county—just as against a natural person; and the court has no discretion to say that it will give three years or any other extension of time, within which to comply with the judgment. If the analogies that apply to the case of a natural person apply to the case of a municipal corporation, the plaintiff is entitled to a full writ. Another view arises from the peculiar nature of the writ of *mandamus;* for the awarding of that writ is in some measure discretionary with the court. It is not to be awarded in frivolous cases, where it is legally impracticable to execute its demand; nor is it to be awarded where there is any other adequate remedy. The doctrines applicable to it at common law practice are very rigid; and in the Court of King's Bench, where it was a prerogative writ, it was really discouraged and defeated in every possible way by the application of technical doctrines. Here is an alternative writ which commands the justices of the county court to levy a tax, or show cause. Now, it is the settled practice at common law that the peremptory writ can not be awarded in any other terms, greater or less than, or different from, the alternative writ; and, if that is so, the peremptory writ in this case must go in the exact language of the alternative writ, which was to levy the whole tax in a year. Another technical doctrine, connected with the law of *mandamus*, is this: that the command must be single, or essentially so; and, therefore, if the writ commands a body to do this thing or that alternatively, it is bad, because it would be uncertain as to what it should do. For example, if shown that some money is in the treasury of this county, and the writ issued commanding the payment of the money, and if not sufficient to satisfy the judgment to levy a tax, it would be certain to some extent, but might not be according to the legal technicalities which surround this writ. But why should not this writ have a plastic form? There is no reason, which I can see, when the alternative writ has been awarded, and the parties have been heard and their rights are before the court, why the peremptory writ should be issued in the same form as the alternative; or why the peremptory writ should not be awarded to meet the exact exigencies of the case? I know no reason why that should, not be law. In accordance with these views the peremptory writ may go for the levy of one-third of the tax this year, one-third next, and one-third the following year; and I would suggest to the counsel for plaintiff to put the writ in such form as he thinks he can sustain; and my judgment is that if he puts in a recital that this matter came on to be heard on the return to the alternative writ, and it appearing to the relator and the court that the levy of this tax of $150,000 in one year would be onerous and oppressive; and that the relator waived the right to collect more than one-third in one year, the Supreme Court will not reverse it, because he assented to take in a milder form less than what he was strictly entitled to under the alternative writ, inasmuch as the defendant can not be damnified thereby."

A UNIFORM CODE OF PROCEDURE.

A glance back into English history, as disclosed by such historians as Stubbs, Freeman, and others, gives us some idea of the conditions which brought about the gradual growth of an artificial and exceedingly formalistic system of procedure, which, in our day, we call the common law system of procedure in England, and, following Coke, invest with the high-sounding saying of "the perfection of reason." Studied carefully, the common law of England is a very indefinite thing; for,

judged according to varying periods of English history, it exhibits the most conspicuous differences. Before Bracton, the so-called common law of England, outside of the influence which the works of Glanvil had in formulating opinion and leading to observance, was mainly composed of customs peculiar to the people who inhabited different sections of the island; not uniform customs, nor customs that came down from a common source, but customs which grew up, through observance, and that mental evolution which the surrounding conditions naturally brought about. The legislature and judiciary did not comprehend that refined and learned element with which the same are now associated in our minds, but, on the contrary, consisted of corrupt and arbitrary clergy and barons, whose principal occupations were war and personal aggrandizement. The King, then, had not yet become invested with that peculiar sanctity which subsequently secured for him the pre-eminence over all other persons in the realm which Henry VIII typified; then he rather occupied the place of a chief among his fellows, who might, if a sufficient unanimity could be secured to accomplish it, be at any time deposed. Such unanimity seldom occurred, because personal aggrandizement was too large an element in the individual minds of the then powerful body to admit of any decided concert of action. With a *witenagemot* composed of executive, legislative and judicial elements of such a kind, the passing of enactments, and their execution through the executive and judicial branch, must have been very imperfect and insufficient. And so it was. And it is thus we account for the oblivion and the practical non-efficacy into which the early enactments fell. In fact, with the comparative strangeness which in those times prevailed between different parts of the island, due to the insufficient means of locomotion, the very existence of such enactments must, for the most part, have remained unknown; and as conditions changed, no desire or occasion for their enforcement led those in power to familiarize the populace therewith. In this way we obtain some faint notion of what the law was before Bracton. There was, in fact, no law as the term is understood by Austin; no uniform rule which was prescribed by a common power; there were only a number of varying customs, which grew up and became modified with the conditions environing the then half barbarous inhabitants of England.

Bracton, somewhat familiar with parts of Roman jurisprudence, wrote his books. And to him is due the first formulation in anything like a definite shape of what subsequently became the nucleus of English common law. Put in a form that possessed a certain degree of durability and shape, observance and practice, according to its exposition, led to the gradual evolution of a common and better understood system of what now, for the first time, deserves the name of *law*. The effect here indicated of Bracton's labors was not the work of a day, but of an indefinite number of generations. To say that during these generations the minds of the inhabitants developed and evolved improvements in innumerable branches of human knowledge, is but to affirm a well-understood process of mental growth; and thus it was that, with the formulation of a common system based on Bracton, improvements and additions to Bracton eventually came about; new customs resulted; the system of compurgation changed to jury trial; the system of assizes grew up from a segregation of the offices peculiar to the *witena;* the judges, whose province was more peculiarly law, came into being, and a common, as well as an elaborately formed system of procedure gradually came into existence.

That this common and formal system of procedure contains the evidences of its growth is beyond question. The familiar "singleness of issue" is one of a number of strong evidences of this growth; for at first all complaints before the judicial body were entirely by word of mouth, and as under such a condition of things multifarious issues would confuse and practically nullify the effect of a complaint, the judicial power would naturally confine itself to a single issue, and practically lead its suitors to do likewise. The change in the process of ejectment—the old process of replevin as Maine has shown—the process of common recovery, detinue, wager of law, wager of battle, appeal, besides all the actions relating to rights in real property, which Blackstone and Coke describe, are all further evidences of the gradual growth of the system of procedure from primitive conditions—thus showing that the so-called common law system of procedure is not the perfection re-

sulting from reason, but the modification of previously existing observances. The system, became, therefore, a mere patchwork of custom, fiction, and a little reasoning—custom peculiar to the conditions in which the system of procedure originated, fiction created by the judicial power almost unconsciously to meet the requirements of more improved society, and reasoning in so far as a proper adherence to the principles of the system were concerned. That such a system must be pregnant with formalism too great for practical efficacy among societies where the needs require expeditious litigation, such as the present age requires, is absolutely beyond question. And this fact has induced England to adopt a new and codified system of procedure, and has led our states, with few exceptions, to do likewise.

In some states, however, where the spirit of the bench and bar is more conservative than in other states, the system of procedure has not been so far changed as to supersede altogether the antiquated and formal procedure formerly prevailing in England, though it has so changed the latter as to leave any adherence to parts of it inconsistent and absurd, unless practically better than that which an entirely reformed and complete code of procedure would offer. How such adherence can be practically better is not easily understood, as whatever merits the former system possessed can be, and for the most part have been incorporated into the reformed system.

Reverting now to the importance of procedure in a system of law, it must be obvious that whatever gives harmony and unity thereto must be beneficial. That which practically secures such harmony and unity more than perhaps ought else is co-operation. Now what co-operation will secure harmony and unity in procedure in the United States? Obviously that co-operation between the respective lawyers and judges of the several states and the federal judiciary as will secure eventually the adoption of such a uniform code of procedure as is practicable among all the states. That a common code of procedure is practicable can scarcely be doubted when we consider the gradual assimilation to state procedure that has been going on in the modification yearly made in the practice prevailing in the federal courts, and the sameness, except in some petty details, which prevails among the codes now existing in most of the states. A common system once concurred in by the body of lawyers and judges, and adopted, the force of public opinion will stay the hand of any legislative body from interfering therewith, except for the better, in any material detail. But to secure this end an organization should be formed, having for its object the adoption of a common code of procedure, and to project means for securing the object, in the same way—but more effectually—that the organization of publicists conceive the possibility of securing the adoption of an international code.

M. M. COHN.

ULTRA VIRES — RIGHT OF A NATIONAL BANK TO SUE ON A PROMISSORY NOTE PURCHASED BY IT.

NATIONAL PEMBERTON BANK v. PORTER.

Supreme Judicial Court of Massachusetts (Essex), November Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

IN AN ACTION upon a negotiable promissory note brought by a national bank, which had purchased the same, against an indorser thereof, the defendant can not raise the defense that the plaintiff, being a national bank under the laws of the United States relating to banks and banking associations, had no power or authority to purchase the note in suit, and, therefore, had no title to the note.

The facts appear sufficiently in the opinion.

D. & C. and *C. G. Saunders*, for the plaintiff; *L. W. Howes*, for the defendant.

LORD, J., delivered the opinion of the court:

The plaintiff bank brings this action against the defendant as the indorser of a promissory note. The note is in the possession of the bank as the holder of it. The defense is that the plaintiff purchased the note of one Benyon; that the plaintiff is a national bank; that a national bank has no authority to buy a promissory note; that the purchase of it was therefore *ultra vires*, and the conclusion of law which the defendant claims to be the legal result of these facts is, that no action can be maintained upon the note by the bank. It is important that we do not confuse our ideas by the use of words, and it is therefore necessary to determine what is the exact contract in suit. The contract is in writing. In form it is a negotiable promissory note. Its legal effect is an absolute agreement on

the part of the maker to pay to the payee, or to any indorsee of the instrument, a sum certain on a day certain; while it is also a conditional promise on the part of the indorser to the indorsee to pay the same sum upon the default of the maker and due notice to himself. In this case, it is conceded that such condition has been performed or waived, so that the promise of the indorser has become absolute. On these points there is no controversy. The contract, therefore, in itself is one which may lawfully exist between these parties. It is the precise contract which exists between the parties as to every note discounted by a bank in the ordinary course of banking business which national banks are authorized to transact. No claim is made that the promise was not made upon a full consideration, or that any fraud was practiced upon any party to the contract, or that it has been paid; or that any equities exist between the maker or any indorser and the holder; or, that under the form of a lawful contract was concealed any usurious device; so that the contract in itself has no taint of usury, of fraud or illegality.

What is the contract which, it is said, is *ultra vires?* Not the contract in suit, but another contract, to wit: the contract with Benyon, who is not, in any sense, a party to the contract in suit; nor is it necessary to the maintenance of this action to connect him with it.

The contract with Benyon, assuming such a contract to have been made, and for the purposes of this discussion, assuming it to have been *ultra vires,* is not executory; this suit is not to enforce it; but it has been fully and completely executed. It is true that the contract with Benyon was one of which the contract in suit was the subject-matter. The question, then, arises, can a party to a contract in itself lawful, and into which all the parties to it had authority to enter, be made null, or be incapable of enforcement, because the plaintiff has entered into, and fully performed with another and totally distinct party, a contract in reference to it which was unauthorized, even though by such a contract he becomes a party to the contract in suit?

There is nothing of mystery or of sanctity in the use of the words of a dead language—*ultra vires;* and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation. We do not see in what respect there is any difference in legal effect, between the obtaining of a note by an individual or by a corporation, if it be obtained wrongfully.

Applying the rule to a natural person, would it be a defense by a maker of an unpaid promissory note, to prove that the plaintiff obtained the note in a fraudulent bargain? or that the plaintiff took it from one not a party to it, in payment for intoxicating liquors illegally sold? or that he took it from a third person in discharge of a gaming debt? or in any transaction in which the person had no right to be engaged? These are all cases in which the party would acquire his title by transactions beyond his authority. These are questions which, under the law of this commonwealth, it is not necessary to decide or consider. In this commonwealth it is not necessary that the plaintiff in a suit upon a promissory note should have the legal title, or beneficial interest in the note, nor, indeed, that he should have any title or any interest in it. Adjucations of this point, commencing with Little v. O'Brien, 9 Mass. 423, are scattered through more than a hundred succeeding volumes of reports, embracing a period ot about seventy years, which have been unquestioned during all that time, and are duly recognized as the law of this commonwealth. In Little v. O'Brien this very question of *ultra vires* was raised by the defendant, and both the question whether a contract with a corporation was *ultra vires,* and whether a plaintiff having no title could sue, was raised and elaborately argued for the defendant by Mr. Story, who afterwards, and for so long a time, adorned the bench of the Supreme Court of the United States. The cause was argued before that eminent magistrate, Chief Justice Parsons, and his distinguished associates, Justices Sewall and Parker. In announcing the decision the court uses this suggestive language: "Whether for this misbehavior of the corporation the government might not seize their franchises, upon due process, is a question not now before us." In Chester Glass Co. v. Dewey, 16 Mass. 94, there was a claim for goods sold and delivered to the defendant, and among other defenses was the defense that the sale of the goods was *ultra vires;* that by their charter the plaintiffs were prohibited from engaging in such a trade; and in addition it was claimed that the corporation was never legally organized, and therefore had no existence as such. As to the last objection, it was said that even if it existed, it would not be open to a member of the corporation, which had been in operation *de facto,* doing business for a number of years. In relation to the claim that the sale of goods was *ultra vires,* Parker, C. J., after expressing a conviction that the sale as made was not a violation of the spirit and intention of the act of incorporation, adds: "But the legislature may enforce the prohibition by causing the charter to be revoked, when they shall determine that it has been abused." Without deeming it necessary to decide that these two cases are authority for saying that it is not open to an individual to raise the question whether a collateral act of a corporation is within its corporate power, it will be found, when that question is directly presented, that there are many decisions of courts which tend to that result.

In this commonwealth, the only questions which are involved are: First: Has the plaintiff legal capacity to sue? Second: Is the plaintiff the holder of the negotiable note declared on? On neither of those questions can there, in this case, be any doubt. Even if it were necessary to show that the contract was one which the plaintiff is competent to hold, then, as we have already seen, this contract is such a one; and the fact that the holder became possessed of it in the manner claimed is a wholly immaterial fact. To illustrate further the fact that it is not necessary that the plaintiff bank

be the owner of the note in order that an action may be maintained upon it, suppose that this note had been discounted in the ordinary course of business, and the bank had filled the blank indorsement, as at any time it had authority to do, and as before judgment is entered it is proper to do, by writing over the indorser's name the words "pay the within to the National Pemberton Bank"—and under its authority to negotiate the note, it had transferred it, without indorsement, for its full value, to a third party; such third party could maintain an action upon it in the name of the present plaintiff, although the present plaintiff has no interest in it. Suppose, for the sake of argument, that the plaintiff is not the *bona fide* holder of the note within the meaning of that phrase, when used in law in relation to the holder of a negotiable promissory note, what would be the result of such admission? Simply this, that any defense might be made to the note which could be made between any of the parties to it, as between one another—nothing more. But in this case there are no equities which could be pleaded to the note in the hands of any party.

If the act of purchase was wholly unauthorized, the utmost legal effect is that the transaction was wholly void, and Benyon is still owner of the note. What then? The most that could be claimed is that the bank receives the payment of it in trust for the real holder; precisely as it would if it had recovered the amount as in the case above supposed, after it had sold the note to a third person. With the equities between such parties, this defendant has no concern. It is said that if this be the correct view of the law, the statute in relation to usurious contracts would be nullified. That a bank could say to a customer, "we cannot discount this note, but we will buy it," and thereupon does buy it, at a rate which they were not authorized to discount it, and thus avoid the penalty of usury. Such result by no means follows. If, in this case, the intervention of Benyon were a mere device for the purpose of obtaining, as between the original parties to the note, a loan of money at a usurious rate of interest, the question presented would be a very different one. There is here no such claim or pretense. The amount given for the note was the face of the note, less the legal interest from the time of the alleged purchase to the maturity of the note. There are, however, other appropriate considerations in such case. The suit, then, must be between the parties to a wrongful contract still executory; and whether in such case the plaintiff would not be estopped to deny that such contract arose in any other mode than by discount, we must not discuss. It is quite sufficient to deal with questions as they arise, without speculating upon what would be the legal effect of a totally different condition of facts.

Two cases have arisen in Minnesota—one in 1876—Farmers and Mechanics Bank (which was a state bank) v. Baldwin, the other in 1877—First National Bank of Rochester (which was a national bank) v. Pierson, in each of which it was decided that the plaintiff could not recover upon a promissory note purchased by it, because such purchase was *ultra vires*, and consequently conferred no title to the note. If we accept the result of these decisions, there is nothing in either of them in conflict with these views. By the law of Minnesota, no action can be maintained upon a chose in action except by the real owner: and, as will be seen by reference to those decisions respectively, the question which the court passed upon was whether the plaintiff acquired a title to the note in suit. In Farm. & Mech. Bank v. Baldwin, 23 Minn. 198, the discussion of the subject by the court is thus opened: "Inasmuch as the ownership of the note by the plaintiff is put in issue by the pleadings, the question necessarily arises whether the plaintiff had the corporate power to make the purchase in the manner it did, and whether by such alleged purchase it acquired any title which it could enforce against either the maker or Baldwin, the indorser." And the concluding paragraph of the opinion commences thus: "Having no corporate capacity to make the contract of purchase, the plaintiff never acquired any title to the note in suit," etc.

In First Nat. Bank v. Pierson, 24 Minn., the finding of the court below, which came before the supreme court for revision, as quoted by the judge who delivered the opinion, was, "that the plaintiff, a national bank corporation, had no authority to purchase or traffic in promissory notes as choses in action, and did not in law require, by the supposed purchase, any title to the note in question, and can not recover in this action." The judge then, having previously referred to the fact found by the court below, that the plaintiff purchased the note, proceeds: "Upon the fact thus found it will be seen that the only question presented is whether a national bank, created * * * is authorized to deal or traffic in promissory notes as a species of personal property, or to acquire any title to such paper by a purchase." It appears, therefore, that in those cases the only question raised was the question of title to the notes in the plaintiffs; and that question, as we have seen, is, in this commonwealth, wholly immaterial; for we have no such statute as the statute of Minnesota requiring a suit to be brought in the name of the real owner of a chose in action, and it is the established law that the holder of a negotiable promissory note may bring suit upon it, whether in law or in fact he be or be not the real owner of it.

There is also the case of Rohrer v. Turrill, 4 Minn. 407, in which the defense to the note was that the plaintiff was not the owner of the note, but had disposed of it to a third person in fraud of creditors. The court say that the fact that the plaintiff had disposed of the note to a third person is a complete defense to the action, and add that it is no concern of the defendant whether that disposition was fraudulent or not; as he had not paid the note, but owed it, it was not a matter for him to inquire by what arrangement it went into the hands of a third party; the actual transfer was to him a perfect defense, and the court can not avoid suggesting the incongruity of the claim of the defendant, that the title of the third party was fraudulently obtained, which, if competent, would simply show that such transfer passed no title, and

that the suit was properly brought in the name of the plaintiff, who would be the real owner in such case.

We are therefore of opinion that there was no error in the refusal of the presiding justice to rule as requested by defendant's counsel. The ruling asked was, upon the facts of the case, a wholly immaterial one, upon which the court was not called upon to make any ruling. Exceptions overruled.

HABEAS CORPUS—EXEMPTION FROM JURY SERVICE.

EX PARTE GOODIN.

Supreme Court of Missouri, April Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Judges.

1. THE PETITIONER REFUSED TO DO SERVICE as a juror in the criminal court, claiming exemption under a statute of the state, in having served seven years as a fire warden. The trial-judge committed him for contempt. On application for a writ of *habeas corpus: Held*, (1.) That the juror was legally exempt; (2.) That he was not entitled to relief by *habeas corpus*.

2. "ADMITTING THAT PETITIONER is exempt under the law, it would seem clear that he is entitled to his discharge under the very terms of the statute." Per SHERWOOD, C. J.

PETITION for writ of *habeas corpus*.

Samuel Reber and *Mead & McCabe*, for petitioner.

SHERWOOD, C. J., delivered the opinion of the Court:

The petitioner, Goodin, was imprisoned for the space of ten days by the order of the court of criminal correction, because of an alleged contempt in refusing to do service as a juror in that court, he claiming exemption from such service by reason of the fact that, first, he is a certified member of the fire wardens of the city of St. Louis, having served seven years as such; second, that he is a member of a volunteer fire company, duly organized and ready for active service. This application presents two salient questions for adjudication: First, whether petitioner is really exempt as claimed; second, whether if thus exempt, the benefits of such exemption can be asserted in the method which the counsel for petitioner have here seen fit to adopt.

I. As to the first point, under the express terms of the acts of 1845 and 1851, referred to in the brief of counsel, we entertain no doubt whatever that petitioner, having served for the period of seven years as a member of the fire wardens of St. Louis, and received his certificate evidencing that fact, is clearly entitled to exemption from jury service. The state, by those statutes, and their acceptance by petitioner, entered into a contract with petitioner, which was supported by a valuable consideration, to-wit: the services to be rendered, and which when rendered constitute a complete and executed contract which the state by subsequent legislation was powerless to annul or abrogate. This doctrine has been so familiar to the profession ever since the decision in Dartmouth College v. Woodward, 4 Wheat. 519, and other cases which followed in its wake, that citation of authorities in its support would scarcely seem necessary. It is true this doctrine was long resisted by many of the state courts, and in the case of Commonwealth v. Bird, 12 Mass. 443, cited by the learned judge of the St. Louis Court of Appeals in the opinion in *Ex parte* Powell, filed with the return herein, was decided prior to the leading case above noted, when as yet an authoritative enunciation of the governing constitutional principle in regard to such matters had not been put forth by the Federal Supreme Court, the final arbiter in this respect. The authorities on this subject are collated in Pomeroy's Const. Law, pp. 365, 369, 370 378, and in Sedgwick's Construct., Stat. and Const. Law, pp. 586, 587 *et seq.* and notes.

The case of Tomlinson v. Jessup 15 Wall. 454, does not, perhaps, militate against the view here taken, when closely considered, and if it does, it is not in harmony with the leading authorities. There the right to tax all corporations was expressly reserved by the act of 1841, in force when the charter of the Northeastern Railroad Company was granted, and in the language of the opinion, the provisions of that law "were as operative, and as much a part of the charter and amendments as if incorporated into them."

But the distinguishing feature of this case, however, is that here services were contracted for and had been fully performed anterior to the legislative exercise of the reserved power of repeal. Every inducement was held out to the corporation; the state through her charter saying to them, "go on and serve as fire wardens for seven years and your exemption from jury service is hereby made secure."

Doubtless a different case would be presented had the state's reserved power of repeal been exercised before the expiration of the seven years, before the contract had been consummated and the inchaote right of exemption had become, by reason of the services rendered, a vested one.

Even in a case where no charter was granted, but a mere bounty offered to all citizens who should engage in the manufacture of salt, it was held, that after the bounty of ten cents per bushel had been actually earned under the law of 1859, the bounty thus earned was not affected by the act of 1861, which reduced the amount of the bounty to ten cents per barrel, as a vested right had been acquired under the former act. People v. Auditor, 9 Mich. 327; Montgomery v. Kasson, 16 Cal. 189; Salt Co. v. East Saginaw, 19 Id. 259; s. c., 13 Wall. 373.

In the case last cited, it is said by Bradley, J.: "Such a law is not a contract except to bestow the promised bounty upon those who earn it so long as the law remain unrepealed." Assuredly the case at bar presents as decided marks of a

vested right as in the cases above cited. We therefore hold as undoubted the petitioner's right to exemption from jury service. This renders it unnecessary to consider whether the petitioner is otherwise exempt.

II. We are thus brought to the consideration of the second branch of our subject. Our *habeas corpus* act (§ 33) provides: "It shall be the duty of the court or magistrate forthwith to remand the party, if it shall appear that he is detained in custody, * * * * * * for any contempt, specially and plainly charged in the commitment by some court, officer or body having authority to commit for a contempt so charged." * * * And the same act (§ 36) further provides: "But no court under the provisions of this chapter shall * * * have power to inquire * * * into the justice or propriety of any commitment for contempt made by any court, officer or body according to law and plainly charged in such commitment, as hereinbefore provided."

If our first position in reference to the exemption of the petitioner from jury service be correct—and the order of commitment shows that the court making that order found the facts to be as stated by petitioner—it would seem to follow that the order shows upon its face neither a "contempt specially and plainly charged in the commitment," nor "authority to commit for a contempt so charged."

And this result must follow, unless it be true that the mere assertion in a court of law of a right bestowed by law is a criminal contempt of the law. This is no doubtful case, where there is room to indulge in presumptions favoring the correctness of the action of the court in making the order; for here the facts constituting the exemption stand admitted upon the record of the commitment, and the provisions of those statutes which give those facts their peculiar significance are also spread at large there.

This view does not antagonize our former decisions; but, on the contrary, is in accord therewith. None of them had ever gone so far as to declare that we would not investigate a matter on *habeas corpus* where it was apparent that the court making the order of commitment had no jurisdiction whatever. Thus in *Ex parte* McKee, 18 Mo. 599, it was said, that while a notary public could imprison a witness for contempt in refusing to give evidence "which may lawfully be required to be given," yet that the notary could not lawfully compel a witness to answer as to matters which it was the privilege of the witness to refuse to answer.

It was impossible to determine in that case whether the questions were relevant or not, and so their relevancy and the consequent authority of the notary to ask and to commit for a refusal to answer them was assumed by this court. So that it is fairly inferrable from that case that, if the order of commitment had shown that the notary acted outside of his jurisdiction in demanding answers to privileged questions, relief would not have been denied the petitioner.

In *Ex parte* Toney, 11 Mo., 662, so often referred to, the jurisdiction of the court over the subject-matter and person was expressly shown by the record, and stress is laid by Napton, J., on this state of the record, when delivering the opinion of the court, holding, as he very properly did, that these record recitals, showing jurisdiction, could not be collaterally attacked by a proceeding in *habeas corpus*. No one can read that opinion with any degree of attention without speedily reaching the conclusion that had the record in that case shown that Toney was a slave, and that consequently the criminal court of St. Louis county had no jurisdiction to sentence him to the penitentiary, this court would not have denied the writ. And this is evidently the view taken of that case in *Ex parte* Page, 49 Mo. 291. Under our jury system jurors are required to be white male citizens [sec. 2, Wag. Stat. 797]. Suppose that a woman should be summoned as a juror; should appear; plead her exemption in consequence of her sex; should refuse to do jury service and the court should commit her for contempt, reciting in the order of commitment the fact of her sex, but deciding that under the law she was not exempt and was liable to punishment for contempt. Can it be doubted that such palpable lack of jurisdiction could be taken advantage of by *habeas corpus*? And yet a woman is only negatively exempt from jury service—exempt because not expressly included in the list of those required by law to serve in that capacity. The court in such an instance would indeed have jurisdiction over the subject-matter, to-wit: the impaneling of the jury, but none whatever over the person of the woman; and the record reciting the above supposed facts would show an entire absence of jurisdiction to require such service at her hands, and consequently that no contempt had been committed. Would the writ of *habeas corpus* be less effective in a case like the present, where the record shows a law which in explicit terms upon the facts admitted exempts the petitioner? Surely not. Mr. Hurd in his work (Hurd, Hab. Corp., 327, 2d Edit.) evidently holds to the same opinion as here announced; for in speaking of defects cognizable under *habeas corpus*, he says: "The jurisdiction over the process being only collaterally appellate, the *habeas corpus*, as before intimated, cannot have the force and operation of a writ of error or a *certiorari*; nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities which render a proceeding voidable only, but with those radical defects which render it absolutely void. * * * * A proceeding defective for irregularity and one void for illegality may be reversed upon error or *certiorari*, but it is the latter defect only which gives authority to discharge on *habeas corpus*." And after giving the usual definition of irregularity, the author proceeds [p. 328]: "Illegally is, properly, predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes 'a complete defect in the proceedings;'" and it would seem to be entirely immaterial in point of principle, whether the "complete defect in the proceedings" "contrary to the prin-

ciples of law," be exhibited by the record, in a commitment for a crime, or a commitment for contempt; as in either case a lack of authority to make the order would be patent of record, and therefore liable to collateral attack by *habeas corpus*. The same views of the functions of the *habeas corpus* are elsewhere announced.

In *Ex parte* Perkins, 18 Cal. 60, the petitioner had been committed for contempt in failing to obey the order of the court to pay the expenses incurred by his wife in an action for divorce, and Baldwin, J., speaking for the court, said: "It is not admissible for the defendant, in a proceeding of this sort, to question the mere regularity of the proceedings. We do not sit as an appellate court in matters of this sort, but as a court of original jurisdiction, invested with a special jurisdiction to discharge the petitioner when no legal cause of detention exists against him. * * * The only question, therefore, which he can make, as affecting the legality of his commitment, involves the power of the court to make the order. And upon this question we have no doubt." And having no doubt as to the legality of the order, the court refused to issue the *habeas corpus*, and for the same reason refused a *certiorari* to bring up the record.

In the State of New York the *habeas corpus* act is, so far as concerns the point being discussed, like our own, and in *re* Percy, 2 Daly,530, Daly, J. said: "My inquiry is limited by statute to two points. (1) Is the contempt specially and plainly charged in the commitment? (2) Had the officer authority to commit for the contempt which is charged? In respect to the first, the circumstances are set forth in the order of commitment, and they amount to a criminal contempt; * * and in respect to the second, a justice of the supreme court has authority to commit for such a contempt;" and so the petitioner was remanded. It can not be doubted that a different result would have ensued if the circumstances set forth in the commitment had not amounted to a criminal contempt. In *re* Fernandez, 10 C. B. 3, where a witness was committed for a refusal to answer questions, and sought to be released upon the ground that the commitment was illegal, a most elaborate discussion followed, in which all the judges participated. The warrant of commitment found and set out the nature of the commitment, and was held good. But Byles, J., said: "If a warrant be made out stating the facts, as in Bushell's case, Vaughn, 135, and showing on the face of it that the alleged contempt was no contempt in point of law, that warrant would no doubt be bad." In People v. Hackley, 24 N. Y. 75, the prisoner had been confined for contempt in refusing to answer certain questions propounded to him before the grand jury. Denio, J., in delivering the opinion of the court, remarked: "As a general rule, the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded. This is especially true where the proceeding by which it is sought to be questioned is a writ of *habeas corpus*, as the question on the validity of the judgment then arises collaterally, and not by the way of review. The *habeas corpus* act moreover declares that where the detention of the party seeking to be discharged by *habeas corpus* appears to be for any contempt, plainly and specially charged in the commitment ordered by a court of competent jurisdiction, he shall be remanded to the custody in which he was found. But this rule is, of course, subject to the qualification that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the alleged offender really committed the act charged will be conclusively determined by the order or judgment of the court; and so with equivocal acts which may be culpable or innocent according to circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of imprisonment."

In Gilliam v. McJunkin, 2 S. C. 442, an administrator having failed to pay a sum of money into court, as ordered, was arrested, and sought to be discharged by *habeas corpus*, and the court said: "The high prerogative writ of *habeas corpus* applies to 'all manner of illegal confinement.' A party committed for a contempt, adjudged by a court of competent jurisdiction, will not be discharged under it. If, however, the alleged contempt is for disobedience of an order in which the court, in the matter before it, was without jurisdiction, the court having the right to grant the writ may inquire into the legality of the caption and detention. * * * * * In a matter clearly within its jurisdiction, the action of one court is beyond the control of that of any other, save by way of appeal, where that mode of provision is provided by law. Where, however, a court in so important a matter as that which affects personal liberty, oversteps the limits of its authority, and endeavors to enforce obedience to its unauthorized acts, it would be a reflection on the administration of public justice if there was no jurisdiction to which the imprisoned citizen could resort for enlargement."

The Supreme Court of Texas, where a witness was imprisoned for contempt in refusing to answer certain questions propounded to him by the mayor, held, that under ordinary circumstances it was a contempt for a witness to refuse to answer questions, but that if the questions were improper and illegal—if they were in reference to matters over which the court had no jurisdiction, and about which it had no right to inquire, the refusal to answer the interrogatory was no contempt of court, any order punishing it as such was void, and the witness entitled to his discharge on *habeas corpus*. Holman v. Mayor, 34 Tex. So, also, in *Ex parte* Summers, 5 Ired. 149, where a person had been committed for a contempt, Ruffin, C. J., remarked: "If there be insufficiency upon the face of the order, the party has his remedy by *habeas corpus*. * * * * The facts constituting the

alleged contempt need not be stated. If, indeed, they be stated, and be insufficient—that is, be such as manifestly can not amount to a contempt—it seems properly agreed that it must be disregarded and the party discharged from an unlawful imprisonment, as in Bushnell's case, Vaughan, 135, where he was committed' for giving a verdict against full and clear evidence.' "

That the court had jurisdiction in Bushnell's case to punish Bushnell or anyone else in its presence for a contempt, is evident, but having spread upon its records facts which by no possibility could amount to a contempt, its commitment was a nullity, and so held. That case would seem directly in point. I am fully aware that it is in conflict of authority in reference to this matter; many of the authorities opposed to the views advanced will be found cited in State v. Toole, 42 N. H. 540.

Were this case one not free from doubt as to whether the petitioner was exempt under the law, were it not patent of record by reason of the facts there recited and admitted that the criminal court had no more jurisdiction over his person than if he had been a woman or an infant, it would not be permitted to question collaterally the validity of the order of commitment in the present instance; but since it is plain that petitioner, upon the recorded facts, is exempt under the law from jury service, it must needs follow that he has not been guilty of a contempt; and that the jurisdiction of the court of criminal correction immediately ceased when those facts constituting the exemption were judicially ascertained and declared.

Again, if we admit that petitioner is exempt under the law, it would seem clear that petitioner is entitled to his discharge under the very terms of the statute, because the act does not merely say that the petitioner shall be remanded if detained in custody for any contempt, specially and plainly charged in the commitment by some court, officer or body having authority to commit for a contempt; but the significant words are added "so charged." If the legislature had intended that every commitment for contempt should be conclusive against the redress by *habeas corpus*, when the court, etc., had a general authority to commit for contempt, the words "so charged" would possess not the slightest signification, and, therefore, I must think that, unless that which is charged in the commitment amounts to a contempt when "so charged," the petitioner who seeks relief by *habeas corpus* should have such relief granted him.

We are all agreed that the petitioner is exempt from jury service, but Judges Napton, Hough and Norton, do not think petitioner entitled to the writ.

Judge Henry concurs with me on all points. The result is that we refuse to issue the writ.

THE judges of the several courts of the city of New York, viz., the Supreme, Superior, Marine and Criminal courts, are the best paid judges in the country. The first named receive a salary of $17,500 a year, the second $15,000, the third $8,000, and the last $12,000.

MARRIAGE VOID IN PLACE OF DOMICIL VOID THOUGH CELEBRATED ELSEWHERE.

KINNEY v. COMMONWEALTH.

Supreme Court of Appeals of Virginia, September Term, 1878.

Hon. R. C. L. MONCURE, Presiding Judge.
" JOSEPH CHRISTIAN, }
" WALTER R. STAPLES, } Associate Judges.
" FRANCIS ANDERSON, }
" WOOD BOULDIN, }

A MARRIAGE void in the state where the parties are domiciled is void within the limits of that state, though celebrated in a state or country where it is not illegal, The *lex domicilii* and not the *lex loci contractus* governs.

J. M. Quarles, for plaintiff in error; Attorney-General *Field*, for the Commonwealth.

CHRISTIAN, J., delivered the opinion of the court:

The plaintiff in error was indicted in the County Court of Augusta County for lewdly associating and cohabiting with Mahala Miller. He was found guilty and a fine assessed against him to the amount of $500. The case was taken up on writ of error to the circuit court, which affirmed the judgment of the county court, and to this latter judgment of the circuit court a writ of error was awarded by one of the judges of this court. The bill of exceptions taken on the trial, in the county court, which brings up before this court the only question we have to determine, is in these words: "Be it remembered, that on the trial of the indictment in this case, the commonwealth, to sustain the issue on her part, proved to the jury that the defendant, Andrew Kinney, and a certain Mahala Miller, on the 1st day of January, 1877, and from that time to the 27th day of August, 1877, in the county of Augusta and State of Virginia, *did live and associate together as man and wife;* that said Andrew Kinney is a negro, and said Mahala Miller a white woman, and that in November, 1874, they, as citizens of the State of Virginia, regularly domiciled in the county of Augusta, left their own state for the purpose of being married in the District of Columbia, and in ten days thereafter returned to this State to live, and have since lived together as man and wife in said county of Augusta.

"The defendant, to sustain the issue on his part, proved that he and the said Mahala Miller were married in the District of Columbia on the 4th day of November, 1874, in accordance with the laws of said District.

"Whereupon, the counsel for the defendant moved the court to instruct the jury as follows, that is to say: That under the circumstances proven the marriage of Andrew Kinney and Mahala Miller in the District of Columbia, on the 4th day of November, 1874, is valid and a bar to this prosecution, and that they must find a verdict of acquittal. But the court refused to give the said instruction

to the jury, and instructed the jury as follows: That the said marriage of the defendant and said Mahala Miller was, under the circumstances proven, but a vain and futile attempt to evade the laws of Virginia, and override her well known public policy, and is therefore no bar to this prosecution; to which opinion and action of the court, in refusing the said instruction asked for by the counsel for the defendant, and in giving the said instruction given by the court, the defendant, by his counsel, excepts, and tenders this his bill of exceptions, which he prays may be signed, sealed and made a part of the record in this case."

The sole question submitted by this bill of exceptions for the adjudication of this court is, whether the alleged marriage celebrated in the District of Columbia, "in accordance with the laws of said District," as certified in the certificate of facts, is a bar to this prosecution. It is conceded that a marriage in this state between a white person and a negro is void.

It is not only prohibited by the statute law, but penalties are imposed for its violation. The first section of chapter 105, code 1873, provides that "all marriages between a white person and a negro, and all marriages which are prohibited by law on account of either of the parties having a former wife or husband then living, *shall be absolutely void* without any decree of divorce or other legal process." In the same section other marriages prohibited by law therein mentioned are voidable only—that is, declared to be *void* only from the time they shall be so declared by decree of divorce or nullity. These are cases of marriage within the prohibited degrees of consanguinity or affinity, or where either party was insane or incapable from physical causes. Such marriages are void when declared to be void by decree of divorce or nullity, or when the parties are convicted under 3d section of chapter 192, which denounces certain penalties against marriages of parties within the proscribed degrees of consanguinity or affinity. But marriage between a white person and a negro is declared by statute *to be absolutely void* without any decree of divorce or other legal process. If, therefore, the marriage had been celebrated in this state, between Andrew Kinney, who is a negro, and Mahala Miller, who is a white woman, no matter by what ceremonies or solemnities, such marriage would have been the merest nullity, and the parties must have been regarded under our laws as lewdly associating and cohabiting together, and obnoxious to the penalties denounced by our statute against this gross offence.

Does the marriage of the parties in the District of Columbia, where marriages between white persons and negroes are not prohibited, present a bar to this prosecution, and put the parties on any different footing when arraigned before our tribunals for a violation of the laws of this state? It is admitted that Andrew Kinney and Mahala Miller had their *domicil* in Augusta county in this state; that they remained out of the state only ten days after their marriage and returned here, and that this county is still their domicil. It is plain to be gathered from the whole record, if not, indeed, admitted, that these parties knowing they could not enter into a valid marriage contract in this state, went to the city of Washington for the purpose of evading the statute law of this state; were there married and in a few days returned to this state. They never changed nor designed to change their *domicil*. *It was here then; it is here now.*

The important question, and one of first importance in this case, is: Does the marriage in the District of Columbia, made *in fraudem legis* of this state, protect the parties in a prosecution in this state for a violation of the penal laws in this most important and vital branch of criminal jurisprudence, affecting the moral well-being and social order of this state? Must the *lex loci contractus* or the *lex domicilii* prevail?

There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage, to classify the parties and persons who may lawfully marry, to dissolve the relation by divorce and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world.

It is insisted, however, by the learned counsel for the plaintiff in error in the ingenious and able argument which he addressed to the court, that, conceding the power of every state and country to pass such laws, yet they never act *extra-territorially*, but must be confined with rare exceptions to such marriages as are contracted and consummated within the state where they are prohibited.

He invokes for his client in this case, the rule laid down by jurists and text writers that "a marriage valid where celebrated, is good everywhere." This is undoubtedly the general rule. But there are certain exceptions to this general rule, and in its application and the affirmance of certain exceptions, there was for a long time much confusion in the authorities and conflict in the cases. I think it may now be affirmed that there are exceptions to this general rule as well established and authoritatively settled as the rule itself. Mr Justice Story, in his valuable work on the Conflict of Laws, § 113, probably lays down the general rule contended for more strongly than any other modern author. He says: "The general principle certainly is, that between persons *sui juris* marriage is to be decided by the law of the place where celebrated. If valid there it is valid everywhere. It has a legal ubiquity of obligation. If invalid there it is equally invalid everywhere." But he immediately adds the following section, § 113 *a*: "The most prominent, if not the only exceptions known to the rule, are those marriages involving polygamy and incest; *those positively prohibited by the public law of a country from motives of policy;* and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country."

In the comparatively recent case of Brook v. Brook, reported in 9 H. L.C. 193, (marg.), 145 (bot-

tom), I find the most elaborate, learned and satisfactory discussion of this general rule on the subject of marriage, with the exceptions thereto, that I have seen in any of the numerous cases on the subject. The facts of that case and the principles therein declared are singularly apposite to the case in hand.

The Act of 5 and 6 William IV, chapter 54, enacts that all marriages which should thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void to all intents and purposes whatsoever. The marriage of a man with his wife's sister is included in this prohibition. William Leigh Brook, after the death of his first wife, intermarried with Mrs. Emily Armetage, the lawful sister of his former wife. The marriage was celebrated at a Lutheran church at Wansbeck, near Atona, in Denmark. At the time of the Danish marriage both Mr. Brook and Mrs. Armetage were lawfully *domiciled* in England; and had merely gone over to Denmark on *a temporary visit*. According to the laws of Denmark, where the marriage was celebrated, it was not unlawful for a man to marry his wife's sister. In a suit among the heirs of Brook, Vice Chancellor Stuart, with whom sat Mr. Justice Cresswell, was of opinion and so declared that the marriage in Denmark was by the law of England invalid. The case was carried up to the House of Lords. It was there considered with that great deliberation and carefulness characteristic of that great tribunal. Opinions were delivered by the Lord Chancellor (Lord Campbell), Lord Cranworth, Lord St. Leonards and Lord Wensleydale. After reviewing a number of English and some American cases, the Lord Chancellor said: "They (the appellants) rest their case entirely upon the fact that the marriage was celebrated in a foreign country, where the marriage of a man with the sister of his deceased wife is permitted. There can be no doubt of the general rule that a foreign marriage valid according to the law of a country where it is celebrated is valid everywhere. But while the *forms* of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicil, the marriage may be good everywhere. But if the contract of marriage is such in essentials as to be contrary to the law of the country of domicil and *it is declared void by that law*, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated." This qualification upon the general rule "that a marriage valid where celebrated is good everywhere," he adds, is to be found in the writings of many eminent jurists who have discussed the subject, among whom he mentions Huberus and Story.

Lord Cranworth states that the marriage referred to in the general rule is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong. The other Lords, as well as Lord Cranworth, concur fully in the opinion of the Lord Chancellor. Whatever conflict of authority there may have been on this subject it may now be affirmed, since the decision of Brook v. Brook, that in England a marriage prohibited by law in that country between parties domiciled there and declared by Act of Parliament to be absolutely void, is invalid there, no matter where celebrated. In this country the same doctrine is affirmed in North Carolina, Louisiana and Tennessee. See Williams v. Oates, 5 Ir. 538; State v. Kennedy, 76 N. C. 251; State v. Ross, 77 N. C.; 4 Cent. L. J., 392, Dupre v. Boqulard, 10 La. An. 411.

Wherever the question has arisen in the southern states it has been held that a marriage between a white person and a negro, although the marriage be celebrated in a state where such marriages are not prohibited, is void in the state of the domicil and when they go to another state temporarily and for the purpose of evading the law, and return to their domicil, such marriage is no bar to a criminal prosecution. And such is the law of this state. It is now so declared by the statute. See Sess. Acts of 1877-8. The statute, however, was passed after the marriage of the parties in this case. But without such statute the marriage was a nullity. It was a marriage prohibited and declared "absolutely void." It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a century; and one upon which social order, public morality and the best interest of both races depend. This unmistakable policy of the Legislature founded, I think, in wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes *absolutely void*, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if, in fraud of the statutory enactments, both races might, by stepping across an imaginary line, bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or country, should be recognized as lawful, though denounced by the public law of the domicil as unlawful and "absolutely void." No state will permit its citizens to violate its laws by such evasion. But the law of the domicil will govern in such case, and when they return they will be subject to all its penalties, as if such marriages had been celebrated within the state whose public law they have set at defiance.

There is one American case which is directly opposed to the principles herein declared, the facts of which are precisely the same as in the case before us. It is the case of Medway v. Needham, 16 Mass. 157, which was strongly relied on by the learned counsel for the plaintiff in error as authority to govern this case. But I think that case is not supported by authority nor grounded on any sound principles of law. That was the case of

a marriage between a white person and a negro. The parties were domiciled in Massachusetts, whose laws at that time prohibited such marriages. They went into Rhode Island, where such marriages were lawful, were there married, and returned to Massachusetts. The supreme court of that state held the marriage to be valid, and declared in an elaborate opinion that "a marriage which is good by the laws of the country where it is celebrated is valid in every other country; and although it should appear that the parties went into another state to contract such marriage with a view to evade the laws of their own country, the marriage in the foreign country will, nevertheless, be valid in the country in which the parties live." In commenting on this case the Lord Chancellor in Brook v. Brook, *supra*, says: "I cannot think it is entitled to much weight, for the learned judge admitted that he was overruling the doctrine of Hurberus and other eminent jurists; he relied on decisions in which the forms only of celebrating the marriage in the country of celebration and the country of domicil were different; and he took the distinction between cases where the absolute prohibition of marriage is forbidden on motives of policy and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which the marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful."

Lord Cranworth, referring to the same case, said: "I also concur entirely with my noble and learned friend that the American decision of Medway v. Needham cannot be treated as proceeding on sound principles of law. The Province or State of Massachusetts positively prohibited by its laws, as contrary to public policy, the marriage of a mulatto with a white woman, and on the grounds pointed out by Mr. Story such a marriage ought certainly to have been held void in Massachusetts, though celebrated in another province where such marriages were lawful." With such condemnation from so high a source as this decision as authority, and when it is opposed by the decisions of our sister southern states above referred to, and contrary to sound principles of law, I think, though a case exactly in point upon its facts, it can have but little weight in forming our judicial determination of the question before us in this case. There is another case also relied on by the counsel for the plaintiff in error for the doctrine that "a marriage valid where celebrated is valid everywhere." It is a Kentucky case, Stevenson v. Gray, 17 B. Mon. 192. That was a marriage between a nephew and his uncle's wife. Such marriages were prohibited in Kentucky but not in Tennessee, and they were there married and returned to Kentucky. It was held that the marriage was valid in Kentucky. But it is noted, that such marriages are not declared by the Kentucky statute *absolutely void*, but voidable only—that is, to be voided by judgment of a district court or court of quarterly sessions. The reasoning of the judge who delivered the opinion of the court in the case, shows that he treats the case of marriage *voidable* only, and not *ipso facto void*. If such marriage had been declared absolutely void by the Kentucky statute, the decision of the court no doubt would have been different.

In the seventh edition of Story's Conflict of Laws, p. 178, the editor adds a section which follows an exhaustive discussion of this whole subject, in which he says: "The limitation defined by Lord Campbell, Chancellor, in Brook v. Brook, is certainly characterized by great moderation and good sense; that while the form of the contract, the rites and ceremonies proper or indispensable for its due celebration are to be governed by the law of the place of contract or of celebration, *the essentials* of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Hence if the incapacity of the parties is such, *that no marriage could* be solemnized between them * * * * and without changing their domicil they go into some other country where no such limitation or restriction exists, and there enter into the formal relation, with a view to return and dwell in the country where such marriage is prohibited by positive law, it is proper to say that a proper self respect of the state government prohibiting such marriage would seem to require that the attempted evasion should not be allowed to prevail."

I have thus considered at length the authorities English and American on this question, because it is one of first impression in this court, and because it is a question which materially affects public morality, social order, and the best interests of both races. The public policy of this state, in preventing the intercommingling of the races, by refusing to legitimize marriage between them, has been illustrated by its legislature for more than a century.

Every well organized society is essentially interested in the existence and harmony and decorum of all its social relations. Marriage, the most elementary and useful of all, must be regulated and controlled by the sovereign power of the state. The purity of public morals, the moral and physical development of both races and the highest advancement of our cherished southern civilization under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent, all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Upon the whole case, I am of the opinion that the marriage celebrated in the District of Columbia between Andrew Kinney and Mahala Miller, though lawful there, being positively prohibited and declared void by the statutes of this state, is invalid

here, and that said marriage was a mere evasion of the laws of this state and can not be pleaded in bar of a criminal prosecution here. If the parties desire to maintain the relation of man and wife they must change their domicil and go to some state or country whose laws recognize the validity of such marriages.

Upon the whole case I am of opinion that there is no error in the judgment of the circuit court affirming the judgment of the county court, and that both be affirmed by this court. All concur.

NOTES OF RECENT DECISIONS.

NEGOTIABLE PAPER — NOTE WHERE AMOUNT NOT CERTAIN NOT NEGOTIABLE. — *Farquhar v. Fidelity Ins. Co.* United States Circuit Court, Eastern District of Pennsylvania, 35 Leg. Int. 404. Where a note was for the payment of a certain sum "together with an attorney's commission of five per cent. for collection, in case suit be instituted hereon, and together with all taxes and charges in the nature thereof that may be levied upon this note or upon the indenture of mortgage accompanying the same, or the principal or interest moneys thereby secured, immediately upon their assessment:" *Held*, that the amount of the note not being certain it did not possess the character of negotiable paper. MCKENNAN, J.: "Overlooking the clause touching attorney's commission, how can it be said that the notes are either unconditional or certain in amount, in view of the stipulation for the payment of taxes or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property and in the hands of the holder (and this is the import of the stipulation), in some places they would probably be free from this charge, while in others they may be subjected to indefinite and varying rates of taxation, so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances, and be dependant upon the domicil of the holder. And of these contemplated charges, or additions to the nominal consideration, the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consideration is thus fluctuating and indefinite, and which are laden with such embarrassments to their circulation, could not perform the functions, and therefore do not possess the character of negotiable paper."

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE, }
" JAMES L. WORDEN, } Associate Justices.
" GEORGE V. HOWK, }
" SAMUEL E. PERKINS, }

COURT AND JURY—IRREGULARITY IN GIVING INSTRUCTIONS.—In this case the judge of the court entered the jury-room while the jury were deliberating upon their verdict, in the absence of, and without notice to the parties or their counsel, and orally "enlarged somewhat" upon the written instructions he had previously given in the cause. HOWK, J., says: "The action of the court complained of was such an irregularity in the proceedings of the court as the law affords no warrant for, nor will excuse. After a cause has been finally submitted to a jury, and they have retired for deliberation, it is provided in sec. 331 of the practice act, that "if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their attorneys." The provisions of this section are mandatory in their requirements. While a jury is out deliberating upon a verdict, it certainly would be an irregularity in the proceedings if, in the absence of and without the knowledge of the parties or their counsel, the court should enter the jury-room and there give the jury information 'as to any part of the testimony,' or 'as to any point of law.' This would be so whether such action of the court was had on Sunday or any other day of the week. The action of the court was such an irregularity in the proceedings as prevented appellant from having a fair trial." Reversed. — *Jones v. Johnson.*

CIVIL AND SCHOOL TOWNSHIPS — PLEADING. — Suit upon the official bond of A as trustee of B township, by the state on the relation of A's successor in office. WORDEN, J., said: "The action was evidently brought to recover money due the civil township as also money due the school township. The civil and the school townships are two different corporations existing in the same territory, but the trustee is the trustee of both corporations. He gives but one bond, which is intended to secure the faithful performance of his duty in respect to both corporations. The complaint seeks to recover moneys due to each of the corporations, and if this can not be done it must be solely because the relator describes himself simply as trustee of the township, which implies the civil and not the school township. 52 Ind. 114. But this court will take notice, as matter of law, that the relator was trustee of the school township if he was trustee of the civil township, and is of the opinion that the designation of his official character was sufficient to enable him to recover as relator the money due to each of the corporations." Affirmed. —*Englis v. State.*

PROMISSORY NOTE — SUFFICIENCY OF TENDER.— Action upon a promissory note of which the following is a copy; "Hartford City, Ind., March 18, 1874. On the first day of January, 1876, we promise to pay to the order of Robert Polk $1,506.13, payable in good notes then due, drawing ten per cent. interest; said notes shall provide for attorney's fees for collecting the same, and to be indorsed by us; should we fail to furnish notes that provide for attorney's fees for the collection of the same, then we agree to place such notes as do not provide for attorney's fees in judgment, without any expense to said Robert Polk," etc. Answer alleging a tender of "good notes" to plaintiff. On the trial one of the notes was objected to, because it was indorsed by the defendants in such a manner as to require all parties on the note to be exhausted before recourse could be had on the defendants as indorsers. It was shown that the maker of the note was insolvent, but that it was secured by mortgage and its payment assured. HOWK, J.: "It is evident from the stipulations of the note sued on, as to attorney's fees, that the 'good notes' in which payment was to be made, might have to be collected by process of law. A note, therefore, that is secured by mortgage on real estate and the payment thereof secured, even though the makers on such note are insolvent, must be regarded as a "good note," within the meaning of the note in

suit. The appellant can not justify his refusal to accept the tender of the note on account of the restricted liability of appellees in their indorsement of the note." Affirmed.—*Polk v. Frash.*

SURVIVING PARTNER—RIGHT TO DISPOSE OF ASSETS OF FIRM.—Action by appellee against appellants, Samuel C. Willson and John N. McConnell, on the following instrument in writing: "I hereby agree to pay R. H. Craig & Co. $300, in consideration of a full and final compromise and settlement this day signed between R. H. Craig & Co. and B. E. Smith & Co. and the I. C. & D. R. R. Co. Payment to be made as soon as work on the line of said road commences west of Crawfordsville. March 6, 1869. S. C. Willson." The complaint alleged that the said instrument was sold and assigned by delivery, and without indorsement, to the plaintiff by McConnell, surviving partner of the firm of R. H. Craig & Co., after the death of all other members of the firm. McConnell was made a defendant to answer to his interest in the writing. Hough and others filed separate counterclaims, alleging that they were creditors of R. H. Craig & Co.; that the firm was insolvent; that the instrument sued on belonged to said firm; that plaintiff had purchased it with full knowledge of all the facts and asking that they be admitted as parties to the suit, and that the proceeds of the instrument sued on be applied in payment of their claims against the firm. On plaintiff's motion these counterclaims were struck out by the court. NIBLACK, C. J.: "A surviving partner is entitled to the exclusive possession and control of the assets of his firm, including choses in action, for the purpose of settling and closing up the business of the partnership. It must be inferred from the facts alleged that the transfer of the obligation in suit by McConnell was for some legitimate purpose within the scope of his authority and not in violation of his trust as surviving partner. The plaintiff was not responsible for McConnell's alleged misapplication of the proceeds of the sale, unless he participated in such misapplication. There is no averment in any one of the counterclaims that the plaintiff's purchase was not a *bona fide* one, and not for a valuable consideration; or that the plaintiff in any manner participated in the misapplication of the proceeds of his purchase. The court did not err in striking out the counterclaims. The insolvency of the firm and of all the members of it, constituted no impediment to McConnell's making a *bona fide* transfer of the assets of the firm, with the ostensible purpose of closing up its business." Affirmed.—*Willson v. Nicholson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.

[Filed October 15, 1878.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

A JUDGMENT RENDERED BY DEFAULT, before the expiration of the day named in the summons for answer, may be reversed on error, and such rendition is not a mistake, neglect or omission of the clerk, within the meaning of sections 528 and 529 of the Civil Code. Motion overruled. Opinion by OKEY, J.—*Williamson v. Nicklin.*

CRIMINAL LAW — PRESUMPTION OF COERCION OF WIFE—VERDICT.—1. The presumption that a married woman who commits a criminal act in the presence of her husband acts under his coercion, is only *prima facie;* and when it is shown that she acted voluntarily and not by coercion she is liable to a prosecution. 2. On a trial, under an indictment for fœticide containing two counts, in one of which it to charged that the crime was committed by means of an instrument, and in the other by administering a drug, it is not error for the court to refuse to charge that if the destruction of the fœtus was the combined effect of the instrument and the drug, and was not caused solely by either, there can be no conviction. 3. A general verdict of "guilty" upon such indictment is not bad for repugnancy. Judgment affirmed. Opinion by MCILVAINE, J.—*Tabler v. State.*

NATIONAL BANKS—PROMISSORY NOTE—RENEWAL—PRACTICE.—1. Where a national bank makes to one of its directors a loan of money which, in amount, and in the rate of interest, is in contravention of the national banking act, the borrower is not estopped to defend against a recovery of interest. 2. If a payee take from the maker a promissory note, and at the same time surrenders the maker's note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal of, or a payment of the original loan. 3. In rendering judgment on a promissory note given to a national bank on renewal, into which note illegal interest on the original note was incorporated, the whole interest on both notes will be disallowed. 4. Payments made generally on a promissory note to a national bank, which note embraces illegal interest, will be applied in satisfaction of the principal. 5. The refusal of the court to compel a witness, on cross-examination, to answer a question as to a matter not relevant to the issue, for the purpose of impairing his credibility, is no ground for a reversal. 6. Where a judgment on a warrant of attorney is opened by proceedings under the civil code, §§534—542, and on issue joined the amount of the judgment is reduced, and the plaintiff takes a second trial, which results in a finding in his favor of the same amount as on the former trial, it is not error to render judgment against him for the costs of the latter trial. Judgment affirmed. Opinion by OKEY, J.—*First Nat. Bk. of Cadiz v. Stemmons,*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.

[Filed October 16, 1878.]

Hon. W. W. JOHNSON, Chief Judge.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" LUTHER DAY,
" T. Q. ASHBURN,
} Judges.

NON-NEGOTIABLE CHOSE IN ACTION—PURCHASER—TITLE.—1. A *bona fide* purchaser for value of a non-negotiable *chose in action*, from one upon whom the owner has by assignment conferred the apparent absolute ownership, when the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting title thereto. 2. B makes and delivers his non-negotiable promissory notes to C, from whom they are obtained by fraud, misrepresentation and without ad-

equate consideration. The assignee, having thus obtained them, transfers them to W, who is a *bona fide* purchaser, for value, before due, without notice: *Held*, C can not reclaim the notes from W. Judgment affirmed. Opinion by WRIGHT, J.—*Combs v. Chandler.*

JUSTICE OF THE PEACE—LIABILITY TO ACTION FOR OFFICIAL ACTS.—1. Justices of the peace, whilst acting within the scope of their authority, are not answerable in a private action for the erroneous exercise of the judicial functions with which they are invested by law. 2. But such justices, and other inferior tribunals, which are invested only with special jurisdiction, and clothed with limited authority, must, at their peril, keep within their prescribed jurisdiction; and, if they transcend the limits of their authority, they are answerable to any one whose rights are thereby invaded. 3. And, in such a case, honesty of purpose, whilst it may mitigate damages, can not justify a clear usurpation of power. 4. Therefore, where a justice of the peace, without authority of law, issues a warrant of arrest, both he and the person at whose instance he so acts, are liable in an action for false imprisonment at the suit of the party illegally arrested by virtue of such warrant. Judgment of district court affirmed. Opinion by SCOTT, J.—*Truesdell v. Combs.*

DOWER—WITNESS—DELIVERY OF DEED.—1. In a suit for dower, while the amended section 313 of the Civil Code, passed April 13, 1874, (71 O. L. 68), was in force, the heir of the deceased husband was a competent witness for the defense, where the title of the deceased husband was at issue. 2. Whether he would have been a competent witness under said section as it was in force prior to the passage, or subsequent to the repeal of said amended section, *quare*. 3. The delivery of a deed by the grantor to the officer taking the acknowledgement, with unqualified instruction to deliver it to the grantee whenever he calls for it, followed by an acceptance of the title to the land conveyed, operates to invest the grantee with the title to the land, although, for convenience merely, the grantee permits the officer to retain possession of the deed. 4. If, after such absolute delivery to the officer, and acceptance by the grantee, but before he takes actual possession of the deed, the grantor marries, his wife is not vested with an inchoate right of dower in the premises, and on her surviving her husband she is not entitled to dower therein. Judgment reversed. Opinion by JOHNSON, C. J.—*Black v. Hoyt.*

MASTER AND SERVANT — NEGLIGENCE—FELLOW-SERVANTS.—1. A master, whether an individual or a corporation, is responsible to his servants for his own negligence; but, as a general rule, not for that of their fellow-servants. 2. Where, however, a master places one servant in a position of subordination to another servant, and the subordinate servant, without fault, is injured through the negligence of the superior servant, while both are acting in the common service, the master is liable therefor. 3. Whether or not one servant is placed by a common master under the control of another servant, thereby creating the relation of superior and subordinate between them, must be determined from the evidence in each particular case. 4. Where an engineer and brakeman were employed by a railroad company in operating the same train, and there was no evidence to prove that the brakeman was placed in a position of subordination to the engineer, other than what may be implied from the rules of the company, requiring the engineer to give certain specified signals as "a notice" to apply or loose the brakes, and requiring the brakeman to manage the brakes "according to circumstances and the signals of the engineman," and placing the brakeman, while on the train, in subordination to the conductor: *Held*, that the engineer and brakeman were servants of the company engaged in a common service; that the relation of superior and subordinate did not exist between them; and that, therefore, the company was not responsible to the brakeman for an injury occasioned by the negligence of the engineer. 5. Where in an action brought in this state against a master by a servant, for an injury sustained in another state through the negligence of a superior servant while engaged in the same service, and the answer merely stated that, by the law of that state, a servant has no action against the master for the negligence of a fellow-servant: *Held*, that the answer fails to meet the case, in not stating what the law of the state was, when the negligence complained of is that of a superior servant, and that a demurrer to the answer may, for that reason, be sustained. Judgment reversed. Opinion by DAY, J., Scott and Ashburn, JJ., dissented from the fourth point of the syllabus.—*Pitts., Ft. Wayne & Chicago R. R. v. Lewis.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July Term, 1878.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

WILL—ANNUITY—ABATEMENT.—1. A clause in a will in these words: "I order that five hundred dollars per year for ten years be paid over to my niece A," gives her an annuity and not a legacy of five thousand dollars payable in installments. Brimblecorn v. Haven, 12 Cush. 511; Stephens' Exrs. v. Haven, 24 N. J. (Eq.) 356. 2. Such annuity is subject to abatement if the income proves insufficient to pay all the annuities in full. 3. Such bequest, containing no words of inheritance or succession, must be construed as giving an annuity for ten years, if the annuitant should survive the testator so long; otherwise for her life only. Blewitt v. Roberts, Cr. & Ph. 274; Yates v. Madden, 3 Mac. & Gor. 532; Savery v. Dyer, 124 Mass. Opinion by SOULE, J.—*Bates v. Barry.*

RAILROAD — LIABILITY TO TICKET HOLDER. — A person who has bought a railroad ticket, by virtue of which he has been carried to a station short of that to which the ticket entitles him to go, and has then voluntarily left the company's premises intending to return by a later train, can not hold the company liable for injuries received upon returning subsequently to the premises, not as passenger, but merely for his own convenience, using the premises as a passage way from the highway to a station of another railroad, it not being alleged that the injuries were willfuly inflicted. Sweeny v. Old Colony & N. R. R., 10 Allen, 368; Gaynor v. Same, 100 Mass. 208. Opinion by SOULE, J.—*Johnson v. Boston & Maine R. R.*

DEPOSIT IN BANK BY WIFE OF WAGES OF HUSBAND—CREDITOR'S BILL.—Where a husband deposited his wages with his wife for safe keeping, and the wife, without his knowledge, deposited the same in a savings bank from time to time, and without his knowledge or assent, used the amount so deposited, together with some money she had borrowed on her sole credit, in payment for certain real estate, the title to which she took and still holds in her own name, it was *held*, that the husband had an equitable lien upon the land

which, under Gen. Stats., ch. 113, § 2, allowing a creditor to reach and apply in payment of his debts any property, right, title or interest, legal or equitable, of a debtor which can not be come at to be attached or taken on execution, could be reached and applied by the plaintiff to the payment of his debt by bill in equity. Opinion by COLT, J. — *Bresinhan* v. *Sheehan*.

MALICIOUS PROSECUTION—TERMINATION OF PRIOR ACTION.—In an action for malicious prosecution, it appeared that the defendant had caused to be instituted before the police court of Salem a complaint against the plaintiff charging her with the crime of larceny: that she was adjudged to be probably guilty and ordered to recognize with surety to answer further to the complaint at the October term, 1874, of the superior court; that she thereupon entered into a recognizance to appear at the October term of the superior court and at any subsequent term or terms until the final sentence, decree or order of the superior court, and to abide such final sentence, decree or order. To prove that this prosecution was at an end, the plaintiff introduced the records of the superior court to show that the grand jury had returned "no bill" in the plaintiff's case, but the record did not show that the plaintiff was thereupon discharged by the court. *Held*, that the prosecution alleged to be malicious had not been terminated, and that the plaintiff, therefore, could not maintain this action. Bul. N. P. 12. Opinion by MORTON, J.—*Knott v. Sargent*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Mt. Vernon, September 30, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

TAXES — VALUATION OF LANDS — NO POWER IN COURT TO CHANGE.—This was an application by the collector of Jackson county for judgment against lands for delinquent taxes of 1874. The defendant in error appeared, and as a defense insisted that the land had been over-valued. The court heard evidence, and reduced the valuation. The People bring the case to this court. WALKER, J. (abstract of opinion). The rule adopted by this court is, that when the assessor and board of equalization have acted, their valuation can not be reviewed. Courts are powerless to hear evidence to alter or in anywise change their valuation. The defendant in error should, under sec. 86 or sec. 97 of the revenue law, have applied to have the assessment corrected. Having failed to do this there is no other remedy, even if the assessment is too high. Reversed and remanded.—*People v. Big Muddy Iron Co.*

JOINT JUDGMENT CAN NOT BE SUSTAINED, UNLESS JOINT LIABILITY IS SHOWN.—This was an action of assumpsit brought by Jeremiah Callahan v. The Cairo & St. Louis R. R. Co., and Henry R. Payson and Fred. E. Canda, partners, as H. R. Payson & Co. Payson & Co. failed to plead, and default was entered as to them. The R. R. Co. pleaded, and upon trial judgment was rendered against all the defendants for amount claimed to be due. All the defendants join in this writ of error. CRAIG, J. (abstract of opinion): 'There are three grounds of error assigned: (1.) The court overruled the motion for a new trial. (2.) The court refused to rule plaintiff's attorney to produce on the trial a certain account. (3.) A joint judgment was rendered against all the defendants, when the evidence fails to show any liability on the part of Payson & Co. The motion for a new trial was based on affidavits filed with it, which are not included in the bill of exceptions, and which are, therefore, not properly before the court. For this reason we can not pass on this point. In support of the second reason, it is not shown that due notice was given, and the rule was no doubt properly refused. The third point we regard as well taken. The record does not show any evidence showing any liability on the part of Payson & Co., or either of them. The rule is well established, that in actions *ex contractu*, in order to recover the plaintiff must establish his cause of action against all of the defendants, and that if the proof fails to show all liable in the contract described in the pleadings, a recovery can not be had. The plaintiff, under our present statute might have amended his declaration and dismissed as to against Payson & Co., and under the evidence recovered against the railroad company. As the evidence fails to show any cause of action against Payson & Co. the judgment must be reversed. Reversed and remanded.—*Cairo & St. Louis R. R. Co. v. Easterly, Admr.*

CAVEAT EMPTOR— EXECUTORS SALES. — This was an action in assumpsit by the executors of Webster against Rumsey on two promissory notes given by Blackwell, since deceased, and signed by Rumsey as surety, the notes being given in payment for certain lands sold at public sale by the plaintiffs as executors. The grounds of defense are three, set up in as many special pleas. The third, being the one relied on, is, in effect, that the notes were given for all the right, title and interest of Leah P. Webster, in and to the lands sold: that the plaintiffs represented at the sale that she died seized thereof in fee simple, and thereby Blackwell was induced to buy the property at its full value and execute the notes, averring that she did not die so seized; that plaintiffs conveyed only their interest as executors; that Blackwell and wife are both dead; that prior to the commencement of this suit a deed was tendered to the plaintiffs reconveying all right gained by the executor's deed; that the conveyance of a fee simple title was the only consideration of the notes and an eviction by superior title. The jury found for defendant, and plaintiffs come to this court on appeal. SCOTT, J. (abstract of opinion): The point relied on by defendant that the purchaser was induced to buy by the representations of the executors that the title was perfect in the decedent, and the title being what he purchased, that failing, there was a total failure of consideration can not be maintained, unless there was such fraud on the part of the executors as would authorize the vendee to rescind the contract *in toto* on reconveying whatever estate he may have obtained. The rule of *caveat emptor* applies to such sales as this, and there is no exception to this rule, except where there has been such fraud as will authorize the vendee to recover the money in case the contract has been executed. In such sales the purchaser, who has no covenants that cover defects in the title, is absolutely without relief, unless a fraud has been practiced on him in the sale that will vitiate the contract. There is no proof of actual fraud in this case. Reversed and remanded.—*Bond v. Rumsey.*

[Filed at Springfield, June 24, 1878.]

DECREE OF FORECLOSURE — EFFECT OF — RELEASE OF HOMESTEAD RIGHT.—The facts in this case are sufficiently stated in the following abstract of the opinion of the court by SHELDON, J.: "The only questions which are raised here are as to the sufficiency of the trust deed and foreclosure proceedings with appellee's deed, to pass to him the right of possession of the premises as against the homestead right which is

set up. Appellant claims that the homestead right has not been released or extinguished. Although the trust deed contains a formal release of the homestead right, that will not suffice under our statute without the acknowledgment of the deed. And it is alleged against the release here that the deed was not acknowledged; that the grantee in the deed himself took and certified the acknowledgment, and that such an acknowledgment is void. 61 Ill. 307; 13 Mich. 329; 7 Watts. 227; 20 Iowa, 231. Appellee contends that though this may be so, the finding in the decree of foreclosure upon proof taken, that the trust deed was legally and properly acknowledged, and that the homestead right was duly and legally relinquished is an adjudication of court upon the question which must be held as conclusive in this collateral proceeding. All the answer that is made to this view is that the bill of foreclosure did not contain any allegation that the homestead had been released, and hence that the decree did not profess to bar or extinguish the right of homestead. There was no specific allegation in the bill of the release of the homestead, but there was a general allegation sufficiently comprehensive to include that. The bill alleges that by the trust deed the premises were conveyed to ——, trustee. How could that be unless the homestead was released? * * * * * The only defect in the trust deed as a release of the homestead is the insufficient acknowledgment. But the bill expressly avers that the deed was duly acknowledged, and the decree finds that it was and that the homestead right was legally relinquished. We think that the allegation in the bill of foreclosure comprehensive to admit proof that the grantors executed and acknowledged a deed which was effective to convey all their interest, homestead right as well as other." Affirmed.—*West v. Krebaum.*

ELECTION — LEGALITY OF — PARTIES NON COMPOS MENTIS.—This was a proceeding commenced by the appellant, in the county court of Cole county, to contest the election held on the 7th day of November, 1876, in that county, for clerk of the circuit court of that county. The cause was heard at the July term, 1877, and judgment given against appellant, from which this appeal was taken. There were a number of votes contested, in reference to which questions of law arise. 1st. Appellant objects to certain votes cast, on the ground that the persons casting them were *non compos mentis*. The court, upon this subject, through SHELDON, J., say: "Upon this subject Judge Cooley, on his work on Const. Lim, 599, remarks: 'In some states, idots and lunatics are also expressly excluded, and it has been supposed that these unfortunate classes, by the common political law of England and of this country, were excluded with women minors and aliens from exercising the right of suffrage, even though not prohibited therefrom by any express constitutional or statutory provision,' citing Cushing's Legislative Assemblies, §§ 24, 27. There is in this state no express exclusion by constitution or statute. Without further remarks upon the legal question, we deem it sufficient to say that we do not regard the testimony as bringing these persons within the description of the above-named classes. In regard to one, who is most obnoxious to the objection, in the amount of adverse professional testimony, there is the testimony of three persons in whose employ he has been, that he is a good hand at work, etc., converses freely, and talks like other men, but owing to some disease he had at some time, his speech is imperfect Yet three medical experts, whose opinions we are asked to accept as conclusive, pronounce him an idiot. They differ in their ideas of an idiot from Blackstone. He says: 'An idiot or natural fool is one that hath had no understanding from his nativity, and, therefore, is by law presumed never to have any.' We find no error in counting these votes for appellant." Affirmed.—*Clark v. Robinson.*

BOOK NOTICES.

THE LAW OF HOMESTEADS AND EXEMPTIONS. By SEYMOUR D. THOMPSON, author of "Cases on the Law of Self-Defense," etc. F. H. THOMAS & CO., St. Louis, 1878.

There is no branch of the law so imperfectly understood by the profession, as the one selected by Mr. Thompson for his theme, and this results from a combination of circumstances readily explained. The exemption of the homestead from execution and sale is of very late and modern invention, and only exists in about thirty of the states of our Union. In England and other sections of the old world, where the feudal system prevails, no necessity exists for such a law, for the policy of those governments has always been to impose as many restrictions upon the alienation of real property as possible. Homestead exemption is based upon the most enlightened policy, for nothing tends so much to attach a man to his government as a knowledge of the fact that he and his family will be measurably protected from his heartless creditor, and from the pangs of that destitution and want which can not always be guarded against, even by the most careful and prudent.

The exemption of the tools and implements of the farmer, mechanic, and manufacturer from forced sale, has been encouraged by every enlightened government from time immemorial, not only as a protection to the owner, but to prevent the government itself from being deprived of the products of his skill and labor. But the policy of exempting the "home" of one who is at the head of a family dependent upon him for support, first attracted the attention of the young republic of Texas, which, in January, 1839, placed upon her statute book the first act of "homestead exemption" known in this or any other country. In 1849 Vermont followed suit, and now it exists in about thirty states, in no two of which, however, is the law precisely alike; and for a long period we were without any well-defined judicial interpretation of these numerous acts. As a natural and legitimate consequence, the practitioner was forced to wade in the dark in his efforts to ascertain the law applicable to this subject, in the several states where homestead acts existed.

The questions which have arisen under these different statutes are innumerable, and have given birth to a large number of conflicting decisions, which necessarily enshrouded the subject in mist and darkness, until, by the most herculean labor and years of diligent application, Mr. Thompson has dispelled the mist, and by the most careful and skillful analyzation of conflicting cases, has led the mind of the practitioner to a proper understanding of the judicial construction and interpretation placed upon these acts by the appellate courts of thirty states. Among the many questions presented to the courts for judicial interpretation and examination, are the following:

1. Is such a statute in derogation of the common law?
2. Must it be construed liberally?
3. Is it remedial?
4. Does state exemption apply to executions issued from the federal courts?
5. What is the effect of proceedings in bankruptcy upon the exemption acts?
6. What is necessary to constitute one the "*head of a family*," so as to avail himself or herself of the exemption?
7. What is understood by the word "family?" If a man is without wife and child, but has servants or others

living with him whom he is under no obligations to support, does he occupy the relation of "head of a family?"

8. Can the husband convey or alienate the homestead without the consent of the wife?

9. Can he, if he has a wife and children living with him, waive or release it, or can he work a forfeiture of it by committing a *tort*, for which a judgment is rendered?

10. If the husband dies leaving infant children, to what extent do their rights prevent the mother from alienating it?

11. Does the privilege extend to an alien?

12. Effect of limitation as to value.

13. If the homestead of the farmer does not reach the value limited by statute, can he supply the deficiency by taking in land not contiguous?

14. Is the right of "homestead" a defense against a paramount title?

15. What title is necessary to support a "homestead right?" Is a life estate sufficient, or is a tenant by *curtesy* within the statute? Will an estate in common support the right in a co-tenant, or must it be an estate in severalty?

16. Can the widow of a partner claim homestead after settlement of partnership estate?

17. What kind of occupancy constitutes a dedication of the "homestead," and what acts of abandonment will create its loss?

18. How is the right of exemption affected by debts created prior to the acquisition of the "homestead?"

19. In the absence of any statutory provision, can an insolvent debtor purchase a homestead, and thereby withdraw from his creditors money which would otherwise be distributed among them?

20. What preference over the "exemption" has a vendor's lien for unpaid purchase money?

21. How, in the absence of any statutory direction, is the homestead right to be set apart?

Now, when we assert that the above do not comprise one-fifth of the questions which have arisen in our courts, with reference to the interpretation to be given to these various state enactments, the reader will begin to realize the immense labor and consummate skill that have been necessary to elucidate this subject —to bring order out of confusion, and to place before the American bar a proper understanding of our "homestead and exemption laws."

To accomplish this most desirable object, the author has grouped the various statutes, and cited and carefully analyzed every decision to be found applicable to them in the several state reports, and in the reports of the Supreme Court of the United States, and in the federal, circuit and district courts; and in a clear and lucid manner has given us the result of his diligent inquiry, and the conclusions of law reached by him.

For the ability, skill, research and learning bestowed upon this subject by Mr. Thompson, he is entitled to the gratitude of the profession. From the examination we have been able to give this book, we are impressed with the belief that it must soon take its place among the standard works of the law.

It is a beautiful volume of over 800 pages, and the publishers and printers seem to have vied with each other in their efforts to produce a work that can not be excelled for its typographical beauty and accuracy.

A TREATISE ON THE CONSTITUTIONAL LIMITATIONS which rest upon the Legislative Power of the States of the American Union. By THOMAS M. COOLEY, LL.D. Fourth Edition. Boston: Little, Brown & Co. 1878.

Mr. Justice Cooley's work on Constitutional Limitation is so well known to the profession that a single notice of the fact that it has just reached a fourth edition is all that is necessary at this time. In a short preface to the last edition the author says: "New topics on state constitutional law are not numerous; but such as are suggested by recent decisions have been discussed in this edition, and it is believed considerable value has been added to the work by further reference to adjudged cases." The work now contains, exclusive of the index and table of cases, 797 pages.

THE TESTAMENTARY LAW AND THE LAW OF INHERITANCE AND APPRENTICES IN MARYLAND. With an Appendix of Forms, and an Index. By EDWARD OTIS HINKLEY, of the Baltimore Bar. Baltimore: J. Murphy & Co. 1878.

COMMENTARIES ON THE LUNACY LAWS OF NEW YORK, and on the Judicial Aspects of Insanity at Common Law and in Equity, including Procedure, as expounded in England and the United States. By JOHN ORDRONAUX, LL.D. Albany: John D. Parsons, Jr. 1878.

The Testamentary Law of Maryland is presented in this work in a handsome volume of nearly 800 pages. The author's plan has been to embrace in one book the statutes and decisions of the courts of that state on the law of wills, administration, the settlement of estate, suits by and against executors, administrators and guardians, etc. The compilation of the state code and digest law is full and accurate. The work does not pretend to touch on the laws of other states; it is entirely local, and of hardly any use outside of the state of Maryland. There, however, it will be of great value to the practitioner.

Mr. Ordronaux's work is scarcely so local in its character. Though principally a history of lunacy legislation in New York and a commentary upon the revised lunacy statutes of that state, it is not confined strictly to those subjects. There are chapters on lunacy legislation in Great Britain; the civil disabilities of persons of unsound mind as affecting contracts, conveyances, etc.; the testamentary capacity of such persons and of habitual drunkards; the criminal responsibility of the insane. The work proper is prefaced with a comprehensive digest of adjudicated principles in the law of insanity. It will be, we should say, of much interest to every criminal lawyer, both in and out of the state whose lunacy laws it is intended to expound. The experience and learning of the author in the subject of which he treats are a guarantee of its worth. He is already widely known as the commissioner in lunacy of the state of New York, professor of medical jurisprudence in the Columbia college law school, and the author of a treatise on the Jurisprudence of Medicine.

QUERIES AND ANSWERS.

[Correspondents in this department are requested to make their questions and answers as brief as possible. Long statements of facts of particular cases will be rejected. Anonymous communications will not be noticed.]

QUERIES.

67. WHERE ONE PART OF A STATEMENT would exculpate and another part inculpate the person making the same, can the jury, in the absence of any other testimony, exclude the exculpatory part and convict the person on the inculpatory part alone? H. P. G.

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68. MARRIED WOMAN — MISTAKE IN DEED. — At common law mistakes in deeds could not be corrected against a married woman. By statute in Ohio the deed

of a married woman can be corrected so as to bar her of dower. Under the homestead law of Ohio, either husband or wife, at any time before sale, can claim homestead to the amount of $1,000. Can the deed of a married woman in Ohio be corrected so as to deprive her of the benefits of a homestead? I will be under obligations if some of the profession will refer me to a case in point. E.

Ironton, O.

ANSWERS.

No. 63.

[7 Cent. L. J. 290.]

It seems that the weight of authority is in favor of not allowing a person who pays money which he is not legally bound to pay to recover back the same. Hancock v. McFarland, 17 Iowa, 124; Eycleshimer v. Van Antwerp, 13 Wis. 546; Hall v. Shultz, 4 Johnson, 270; Morris v. Tarin, 1 Dallas, 147. To the contrary, see Lafayette & Indianapolis R. R. v. Pattison, 41 Ind.

Brunswick, Mo, H. P. G.

No. 66.

[7 Cent. L. J. 320.]

The statute of limitations of Missouri does not apply to the remedy on mortgages, nor never did. So our supreme court have uniformly held from its organization to the present time. However, they hold that a mortgagee can not foreclose after the lapse of twenty years, on the ground that after that time the debt is secured by the instrument is *paid* presumptively, not *barred* (Cape Girardeau Co. v. Harbison, 58 Mo. 90), since they have held in other cases that though the debt itself is barred by the statute of limitation, yet the remedy can be pursued on the mortgage until the lapse of twenty years. So, if a mortgage was executed on lands in Missouri in 1862, it can yet be foreclosed. The statute of limitations of ten years did not apply then nor now, nor never did. S. P. S.

Warrensburg, Mo.

NOTES.

FRANCIS HILLIARD, the well-known legal writer, died at his residence in Worcester, Massa., on the 9th instant, aged 72 years. He was born in Cambridge, Mass., and graduated at Harvard in 1823. He practiced law for several years in the courts of Massachusetts, served as a member of the legislature, and was judge of the Court of Insolvency of Norfolk county. He abandoned practice many years ago, and has occupied himself in the preparation of various works in different departments of law, beginning with a work on the Elements of Law, of which a second and much enlarged edition in two volumes has just been issued from the press. His other books on Injunctions, Bankruptcy, Contracts, Mortgages, New Trials, Taxation, Torts, Real Property, Sales, Vendors, etc., have become standard works and have passed through several editions. He was a contributor to this JOURNAL from its first number.——The Supreme Court of the United States met on the 14th inst. All the judges were present except Mr. Justice Field. The docket for the present term contains 849 cases.——The annual meeting of the Illinois State Bar Association will take place next January. The session is to extend over two days, and the exercises are to consist, among other things, of an address by Hon. O. H. Browning, and a memorial address by Hon. C. B. Lawrence upon the life, character and services of the late Mr. Justice Breese.——Miss Belva Lockwood, the Washington female lawyer, has been refused permission to practice in the Maryland Circuit Court.——Mr. Justice Keogh, the Irish judge who lately made a murderous assault upon his servant while under a fit of insanity, is dead. The *Times* says that his was a "career of unflinching duty, passed in affairs and before the eyes of a nation, not always above reasonable criticism, but free from all serious approach. To the example of such a career his countrymen may point with pride, and only the least reputable among them, we hope, will try to blacken it. Mr. Justice Keogh was a brilliant orator and a courageous judge. His judgment in the Galway petition will be cited to his honor, and will bear fruit to the good of Ireland, long after the party and priestly virulence from which he suffered has passed out of mind."

A WRITER in the last number of the *International Review* discusses the recent changes in the American State Constitutions. In 1870, amendments were made in Illinois, Tennessee, Louisiana and Vermont; in 1871-5, in Florida; in 1872, West Virginia; in 1873, Pennsylvania; in 1874, New York; in 1875, Alabama, Arkansas, Kansas, Missouri, Nebraska, North Carolina, Texas, Connecticut, Maine, Minnesota, New Jersey; in 1876, Colorado, Michigan; in 1877, Georgia and New Hampshire. The most striking change in the reservation of power to the people in pure administration is the assumption of the choice of judges by the people in place of their appointment by the executive, or their designation by the legislative body. In 1830 half the twenty-four states intrusted the appointment of the judges to the Governor; the other half provided for elections by the Legislatures in joint assembly, or qualified the executive nomination by legislative sanction. Of the thirty-eight states now existing, twenty-four now elect judges by popular vote, nine give their appointment to the Governor, and five continue to elect in joint assembly. In 1830 no state elected judges by popular vote; to-day the number of states so electing is equal to the whole number of states in the Union at that time. On the other hand, the short terms of office which characterize those states with a legislative choice, have been succeeded under popular elections by long terms. Under popular elections the term of the judges of the highest court in California and Missouri is ten years; in West Virginia, twelve years; in New York, fourteen years, and in Pennsylvania, twenty-one years, incumbents not being re-eligible in the last case. In fact, the average term of popularly elected judges is not much less than ten years, with such classification as to secure the state against the change of its whole Bench at once. The states intrusting judicial appointments to the Governor secure to the incumbent possession during good behavior, sometimes with a limit of superannuation In those where the legislatures elect, terms vary greatly from two years in Vermont to twelve in Virginia. The Vermont practice has been to elect judges every session — even annually when the sessions were annual. The provisions for the impeachment of judges have not been materially changed, but many states now permit the Governor to remove judges for reasonable cause, on the address of two-thirds or three-fourths of both houses of the legislature. New Hampshire, one of the states which retains the gubernatorial appointment of judges, has just refused to sanction an amendment prohibiting the removal of judicial and other commissioned officers (upon the address of the legislature) "for political reasons."